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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND
LOCAL UNION 5895, UNITED STEELWORKERS OF
AMERICA, AFL-CIO,

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD
AND
CARRIER CORPORATION

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The Decision and Order of the National Labor Relations Board (R. 362), including the Intermediate Report of the Trial Examiner (R. 312), is reported at 132 N.L.R.B. 127. The opinion of the Court of Appeals for the Second Circuit, as originally issued (R. 385), is not reported. On petitions for rehearing and rehearing in banc (R. 419-430), the court issued an opinion denying rehearing but amending its original opinion (R. 438), and an opinion denying rehearing in banc (R. 441) which was accompanied by a dissenting opinion by Judge Clark. The opinion of the Court as amended, together with the denial of rehearing in banc and Judge Clark's dissent, are reported at 311 F. 2d 135.

JURISDICTION

The judgment of the Court of Appeals was entered on October 18, 1962 (R. 419). Timely petitions for rehearing and rehearing in banc were denied on December 12, 1962 (R. 443). The petition for certiorari was filed on March 12, 1963, and granted on May 13, 1963 (R. 444). This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 8(b)(4)(B) of the National Labor Relations Act prohibits a union which is engaged in a lawful strike at an industrial plant from picketing at the gate at which a railroad-owned spur track enters the plant, for the purpose of inducing persons employed by the railroad not to make pickups and deliveries at the struck plant.

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended 29 U.S.C. § 157 (1958), states as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(b)(4)(B) of the Act, as amended, 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(B) (Supp. IV, 1963), states in pertinent part as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .”

Prior to the 1959 amendments to the Act, the substance of what is now Section 8(b)(4)(B) appeared in Section 8(b)(4)(A), as follows:

“(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or man-

ufacturer, or to cease doing business with any other person;"

Section 13 of the Act, 49 Stat. 457 (1935), as amended 29 U.S.C. 163 (1958), states as follows:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT OF THE CASE

In this case a divided Court of Appeals, reversing a decision of the National Labor Relations Board, has held that a union committed a "secondary boycott" in violation of Section 8(b)(4)(B) of the National Labor Relations Act when it attempted to induce employees of a railroad not to pick up or deliver goods at a plant where the union was engaged in a legitimate economic strike.

A. The Facts

The essential facts are undisputed. The United Steelworkers of America was, at the time this case arose, the collective bargaining representative of the employees of the Carrier Corporation at its Syracuse, New York plant. In March, 1960, after a period of fruitless negotiations for a collective bargaining agreement, the union called a strike. In connection with that strike, it picketed the various entrances to the plant premises. One of the entrances picketed by the union is that which is used by the New York Central Railroad in making pickups and deliveries at Carrier. It is the lawfulness of the picketing at that entrance which is in issue in this case:

The New York Central serves Carrier by means of a spur which runs along the southern border of the Carrier premises (R. 317). The spur passes through a gate in a chain-link fence which runs along the western border of the Car-

rier premises and continues along the southern side of the spur, thus putting both the spur and the Carrier plant within the same enclosure (R. 319). At one time Carrier had owned all the property inside the plant fence, but it had conveyed the strip on which the spur runs to the railroad prior to the events of this case (R. 318).

The same spur also serves other industrial plants adjacent to Carrier's (R. 317). Just inside the gate, there is a so-called "runaround track," which branches off of the spur, and which is used by the train to reach various pick-up and delivery points located on Carrier property (R. 320, Gen. Counsel Ex. 9, R. 311). In order to switch onto this run-around track, the train must pass back and forth several times through the gate (R. 320).

For the first nine days of the strike, the railroad made no effort to service Carrier, and the union made no effort to interfere with the railroad's use of the gate and the spur to serve its other customers (R. 319). On the tenth day, however, after serving its other customers without incident, the train emerged from the gate and began to make preparations to switch onto the runaround track for the purpose of picking up loaded freight cars on the Carrier property and replace them with "empties." At this point, the union, by picketing and other conduct at the gate, attempted to prevent the railroad from completing this operation (R. 320-23).

B. The Decision of the Board

In so far as the union's conduct at the railroad gate and elsewhere went beyond peaceful picketing and involved force and threats of force, the Board found it to be violative of Section 8(b)(1)(A) of the Act. The union consented to the enforcement of the Board's order remedying those violations, and they are no longer part of the case.

As to the alleged violation of Section 8(b)(4)(B), the Board held that this case was controlled by *Local 761, IUE v. NLRB*, 366 U. S. 667 (1961), the *General Electric* case,

in which this Court had held that a striking union may picket a gate to the struck premises which is used exclusively by employees of other employers, if those employees perform work at the struck site which relates to the normal operations of the primary employer. The Board relied on this Court's specific statement that "if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations" (R. 364).

The Board regarded as immaterial the fact that the railroad tracks, and the gate through which they passed, happened to be owned by the New York Central and not by Carrier. It pointed out that "the gate was an entrance directly into the Carrier premises which the railroad had to use in order to carry out its function of transporting Carrier products to and from the Carrier plant" (R. 365 n.1). It concluded that the "key" to the problem is to be found in the type of work being done by those passing through the gate," and found that "the services performed by New York Central for Carrier—the delivery of empty box cars to Carrier and the transportation of Carrier products—clearly were related to Carrier's normal operations" (R. 365-66). It therefore held that the union had not violated Section 8(b)(4)(B).

Member Rodgers dissented (R. 369-71). He argued that since the railroad tracks were owned by the railroad, not by Carrier, the case was distinguishable from *General Electric*. He also argued that the fact that the union's picketing was accompanied by violence made it not only a violation of Section 8(b)(1)(A), but 8(b)(4)(B) as well.

C. Decision of the Court of Appeals

On review, the Court of Appeals for the Second Circuit reversed the decision of the Board, Chief Judge Lumbard dissenting. The majority opinion, after reviewing a num-

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ber of decisions under Section 8(b)(4), concluded that the only legitimate objective of picketing is to appeal to primary employees, and that "involvement of *neutral* employees" (Emphasis in original) is permissible only "if incidental to the pursuit of a legitimate primary objective." Thus, the Court stated, picketing must be conducted "in such a manner and at at such a place as to minimize its impact on neutral employees insofar as this could be done without substantial impairment of the effectiveness of the picketing in reaching primary employees" (R. 403).

The court then applied these principles to the facts of this case:

"The relevance of these principles to the issue before us is clear. In picketing the railroad right of way adjacent to the Carrier plant, the union was not furthering its legitimate objective of publicizing its dispute to Carrier employees. Eight gates on the employer's premises existed, and were picketed, for this purpose. Carrier employees were not permitted access to the plant through the gate on the railroad right of way. In picketing on the railroad right of way the union demonstrated that its manifest, and *sole*, objective was to induce or to encourage railroad employees, or to coerce the railroad, to refuse to handle Carrier goods or otherwise to deal with the primary employer. Such results, although permissible when merely incidental to the pursuit of legitimate objectives, *DiGiorgio Fruit Corp. v. NLRB*, 191 F. 2d 642 (D.C. Cir. 1951), here involved no such redemptive feature. The actions of the union were thus in violation of §§ 8(b)(4)(i) and (ii)(B) of the Act" (R. 403-404) (Emphasis by the Court).

The court then turned to a discussion of the decisions of other circuits. After citing a number of decisions which it considered "consistent with the principles set forth above,"

it discussed in detail the decision of the District of Columbia Circuit in *Seafarers International Union v. NLRB*, 265 F. 2d 585. (1959), which "denied enforcement of an order of the Board which was clearly required by these principles" (R. 404). It concluded that the decision of the court in that case was erroneous, and stated that "insofar as the decision . . . rests upon a line of reasoning we cannot accept, we find the case unpersuasive" (R. 406).

Finally, the court dealt with the argument that the Board's decision is supported by this Court's decision in the *General Electric* case:

"The Court's holding in *General Electric* does not, of course, conflict with the result we here reach. In both cases, union picketing activities are held to violate § 8(b) (4) of the Act because of their appeal to neutral employees. In *General Electric*, the picketing took place at the premises of the employer with whom the union was engaged in a dispute. The Supreme Court limited its finding of illegality, therefore, to circumstances in which the neutral employees were not engaged in work connected with the normal operations of the plant. In so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing at the premises of the primary employer . . .

"In this case, however, the union activity occurred on the right of way of the New York Central Railroad. No special policy of greater latitude for picketing at the primary employer's premises thus comes into play, and no distinction based on the work performed by the neutral employees need be made" (R. 407; Emphasis in original).

Chief Judge Lumbard dissented. The crux of his opinion is contained in the following paragraph:

"As I understand the cases in this area, the lawful-

ness of picketing depends on the legitimacy of the union's objective; the place where the picketing occurs is controlling only insofar as it sheds light on the union's objective. The legitimate objectives of picketing include publicizing a dispute to employees of neutral employers who are performing part of the everyday operations of the struck employer. Since the picketing which occurred here had that objective, and since there was no other place where the union could conduct such picketing, I agree with the National Labor Relations Board that there was no violation of the Act" (R. 408).

The dissent pointed out that the majority's premise—"that the only lawful objective of picketing is to reach the employees of the primary employer"—is squarely in conflict with *General Electric* (R. 415-16). And it rejected as irrelevant the majority's preoccupation with ownership of the railroad right-of-way:

"Nowhere in the opinion in *Local 761* can I find the 'special solicitude' for picketing the premises of a primary employer which the majority finds, except insofar as the location of the picketing indicates its motive What the [majority's] alleged distinction comes down to is that the union can seek to influence neutral employees at the premises of the primary employer and not elsewhere (which in this case means, of course, that it cannot use pickets to influence the railroad workers at all). But this makes the test not the union's objective but the location of the picketing, a test which the majority itself admits to be obsolete" (R. 416).

Both the Board and the Union petitioned for rehearing and for rehearing in banc (R. 419, 430). On December 12, 1962, the petitions were denied, Judges Clark, Smith and Hays dissenting on the denial of rehearing in banc (R. 441). It was announced that Chief Judge Lumbard, though he

did not vote for rehearing, "adheres to his dissenting opinion heretofore filed" (R. 438). Judge Waterman amended his opinion to respond to the contention in the petitions that certain of the cases upon which he relied in his opinion had been expressly overruled or reversed (R. 438-441). Judge Clark filed an opinion explaining his dissent, in which he stated that "There can be no question of the importance of the issue; and the present departure from previous holdings of this court and of the Supreme Court, even if not as clear as I believe it to be, certainly presents a *prima facie* case of conflicting precedents" (R. 441-442).

SUMMARY OF ARGUMENT

I

A. Section 8(b)(4)(B) does not prohibit a union which is engaged in a lawful economic strike from inducing employees of other employers, by picketing or other means, not to make pickups and deliveries at the struck employer's plant. The central thesis of the decision below, that the only legitimate object of picketing is to appeal to the employees of the "primary" employer and that the statute prohibits all appeals to other employees which are not merely an unavoidable incident of an appeal to primary employees, was squarely rejected by this Court's recent decision in the *General Electric* case, *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U. S. 667 (1961).

In *General Electric*, the union picketed a gate to the struck employer's premises which had been reserved exclusively for employees of other employers who performed various types of work on the struck premises. Although such picketing plainly appealed solely to the secondary employees, this Court, reversing a decision that the picketing was unlawful *per se*, held that the picketing would be lawful if the work performed by the secondary employees was delivery work, maintenance work, or other work related to the struck employer's normal operations.

The court below attempted to distinguish *General Electric* on the basis of a fact totally unrelated to the rationale either of its own opinion or of the *General Electric* opinion—the location of the picketing. Before discussing this distinction in detail, however, we believe it is necessary to put the *General Electric* decision in its historical context.

B. The Board and the courts have always recognized that Section 8(b)(4), despite its broad language, was designed to prohibit secondary boycotts and not to affect the lawfulness of the ordinary primary strike. In the years 1947 to 1952, the Board held that attempts to induce all persons, including employees of other employers, to stop working at a struck employer's premises were traditional primary conduct not prohibited by the statute. On the other hand, the Board held that any attempt to induce a work stoppage by secondary employees elsewhere than at the primary employer's premises is an unlawful secondary boycott.

The *Moore Dry Dock* rules, first announced in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950), were designed to implement this principle in the context of the so-called "common situs" situation, where the primary employer's business is located on premises owned by, or shared with, another employer. In that case, the Board held that a union could picket the secondary employer's dry dock, where the primary employer's struck ship was being serviced, so long as the picketing is conducted (1) only when the struck ship was at the dock, (2) when the struck employer is engaged in his normal business at the dock, (3) in a manner clearly disclosing the identity of the offending employer, (4) as close as possible to the situs of the dispute. The Board in that decision made clear that the purpose of these rules was not to prevent the picketing from affecting secondary employees, but only to prevent it from inducing them to refuse to perform work elsewhere than on the struck ship.

After 1953, the Board gradually began to change its view.

It took the position that the only legitimate object of picketing is to appeal to the employees of the primary employer, and any appeals to secondary employees were prohibited unless they were unavoidable incidents of appeals to primary employees.

This new notion first appeared in a series of common-situs cases, in which the primary employer also had his own separate premises at which picketing could be conducted. The Board, on the basis of its new doctrine, held in those cases that if the union could adequately appeal to primary employees by picketing the separate premises, then all picketing at the common premises would be unlawful, even if it complied with the *Moore Dry Dock* safeguards.

Eventually, this new doctrine was applied to cases involving no common situs, but picketing of the ordinary industrial plant. In a number of cases of which *General Electric* itself is typical, the Board found picketing at such a plant to be unlawful where it was addressed solely to employees of other employers, and could not be justified as "incidental" to an appeal to primary employees.

This Court, in its decision in *General Electric*, necessarily overruled this doctrine. It also rejected the opposing contention, based on the earlier Board cases, that the legitimacy of appeals to secondary employees depended upon whether they were being asked to refrain from working only at the struck employer's premises or elsewhere.

Instead, this Court held that "the key to the problem" was "the type of work that is being performed" by the secondary employees. If the secondary employees are performing work related to the normal operations of the primary employer, then the striking union may lawfully induce them to stop performing that work. Conversely, if their work is unrelated to the primary employer's operations, then any direct interference with that work must be regarded as "secondary" pressure.

In essence, this Court held that any effort to bring direct

economic pressure on the primary employer by causing a stoppage of work related to his normal operations is primary, irrespective of the identity of the employees who are engaged in the stoppage or the location of the work. On the other hand, any effort to induce secondary employees to stop performing work unrelated to the primary employer's operations is "secondary," since the object of such conduct is to bring indirect pressure on the primary employer through the application of direct pressure on the secondary employer.

It is thus plain that the cases holding that all direct appeals to secondary employees are unlawful cannot survive the decision in *General Electric*, and that the decision of the court below, to the extent that it relies on that discredited doctrine, cannot stand.

C. It is equally plain that the present case cannot be distinguished from *General Electric*—as the court tried to distinguish it—on the basis of the location of the picketing. Indeed, neither *General Electric* nor any case which preceded it has made the location of picketing, in itself, the test of its lawfulness.

In the early Board cases, the question was not where the union was picketing, but where the work was which the pickets were asking the secondary employees not to perform. If the work was at the primary employer's premises, the picketing was lawful. Otherwise, it was not.

In the cases decided between 1953 and 1961, the question was not where the union was picketing, but to whom the picket signs were addressed. Even picketing at the primary premises was held unlawful where it appealed solely to secondary employees.

In *General Electric*, this Court said the question was not where the union was picketing, but what type of work it was asking the secondary employees not to perform.

Of course, the location of picketing activity in many cases is evidence of its object. But in this case, there is no dispute that the object of the picketing was to induce the railroad

employees not to make pickups or deliveries at the Carrier premises. Since this Court in *General Electric* expressly acknowledged that pickups and deliveries are related to the normal operations of a plant, the object of the picketing was plainly lawful, and its location totally irrelevant.

II

The argument above disposes of the grounds upon which the court below based its decision. The company, however, and the dissenting member of the Board, have also argued that even if the peaceful aspects of the picketing did not violate Section 8(b)(4)(i)(B), the physically coercive aspects violated Section 8(b)(4)(ii)(B).

Section 8(b)(4)(ii) does not prohibit physical coercion as such any more than Section 8(b)(4)(i) prohibits peaceful picketing as such. The statute prohibits either form of activity only when it is engaged in for one of the objects which it specifically prohibits.

Thus, if the "object" of the union's conduct were unlawful, then even peaceful picketing for that object would be unlawful. But since, as we have seen, that object was "lawful," Section 8(b)(4) does not prohibit even violent conduct which has the same object.

This is not to say that the violence was lawful. It obviously violated state law, and was found by the Board to violate Section 8(b)(1)(A) of the Act as well. But since its object was not one prohibited by Section 8(b)(4), it could not violate that Section.

ARGUMENT

I—SECTION 8(b)(4)(B) DOES NOT PROHIBIT A UNION WHICH IS ENGAGED IN A LAWFUL STRIKE FROM ENGAGING IN PICKETING OR OTHER CONDUCT FOR THE PURPOSE OF INDUCING EMPLOYEES OF OTHER EMPLOYERS TO REFRAIN FROM MAKING PICKUPS AND DELIVERIES AT THE PREMISES OF THE STRUCK EMPLOYER.

The sole question in this case is whether the union violated the secondary boycott provision—Section 8(b)(4)(B)—of the National Labor Relations Act by engaging in picketing and other conduct for the purpose of inducing persons employed by the New York Central Railroad not to make pickups and deliveries at the plant of Carrier Corporation, against which the union was then engaged in a lawful economic strike. The court below, reversing the Board, answered that question in the affirmative.

To the extent that the union's conduct went beyond peaceful persuasion, and involved elements of physical coercion and restraint, the Board held that the union violated Section 8(b)(1)(A) of the Act. The union has not challenged that aspect of this case, and it is not in issue in this Court.

Similarly, Carrier Corporation has never contended that the union interfered in any way with any of the railroad's other operations. There was no strike or concerted pressure against the New York Central generally. As the company stated in its brief in the court below, "this conduct of the Unions directed toward the railroad and its employees was limited to occasions when the railroad sought to service Carrier."

The central thesis upon which the entire opinion of the court below rests is that under Section 8(b)(4)(B) the only legitimate objective of any strike or picketing activity is to induce the employees of the employer with whom the

union has a legitimate dispute to refrain from working, and that "involvement of the employees of *neutral* employers [is] permissible only if merely incidental to the pursuit of a legitimate primary objective." Accordingly, the court said, picketing, to be lawful, must "be conducted in such a manner and at such a place as to minimize its impact on neutral employees insofar as this could be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees." (R. 403. Emphasis by the court).

Once having established that premise, the conclusion that the union's conduct in this case was unlawful followed automatically. The union's dispute was with Carrier Corporation. The picketing in issue here was plainly conducted in such a manner, and at such a place, as to appeal solely to the employees of the New York Central not to make deliveries or pickups at the Carrier plant. The appeal plainly was not "incidental" to any appeal to Carrier employees and hence, on the premise of the court below, was plainly unlawful. The premise is, however, simply erroneous.

The question of whether, and to what extent, Section 8(b)(4) prohibits a union which is on strike against an employer from seeking the assistance of employees of other employers has been the subject of considerable litigation since 1947, when that Section was first added to the statute.¹

¹ The statute, of course, was amended in 1959, and this case arises under the amended version. The amendments, however, affect this case only in the following respects:

1. They make it clear that railroads and their employees are to be treated the same as other employers and employees under Section 8(b)(4), although they are not otherwise covered by the Act. See 2 Legislative History, Labor Management Reporting and Disclosure Act of 1959 at 1522-23, 1706-07, 1712, 1857.

2. They make explicit what was previously only implied—that the language of Section 8(b)(4)(B), which is carried over essentially unchanged from the old 8(b)(4)(A), is not to be "construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

3. They provide for the first time that other forms of coercion

Unfortunately, this great volume of litigation seems at times to have served more to confuse than to clarify the issue. At various times in its history, the NLRB, and to a lesser extent even the courts, have taken various positions on this question, many of them sharply in conflict with one another.

Thus the court below was able to cite some decisions which seemed to support the result which it reached, just as it was able to cite some which seemed in conflict with that result.

If this were a case of first impression in this Court, therefore, it would be appropriate to begin this brief by examining the various cases, pro and contra, in the light of the statute and the legislative history, to determine which view is most in accord with the purposes of the Act.

But this is not a case of first impression. The same issue, which is presented in this case was presented to this Court in the *General Electric* case, *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U. S. 667 (1961), and the decision in that case is dispositive of this one.

Thus, unlike the court below, we believe that any discussion of the issue in this case must begin with a discussion of the decision in the *General Electric* case.

A. The General Electric Decision Plainly Holds That a Striking Union May Lawfully Induce Employees of Other Employers Not to Perform Work Which Is Related to the Normal Operations of an Employer with Whom the Union Has a Legitimate Dispute.

In *General Electric*, the union, in the course of a lawful strike against a plant of General Electric Company, picketed

and restraint, in addition to strikes and picketing, are unlawful if engaged in for one of the objects specified in the statute. The question of whether this change affects this case is discussed at pp. 39-42, *infra*.

On the basic question in this case, whether the union's picketing was "primary" or "secondary," the cases decided under the prior statute are equally relevant under the amended statute.

For the convenience of the Court, we have reproduced both the original statute and the amended version at pp. 3-4 of this brief.

all of the gates to that plant, including a gate which had been reserved by the Company for the exclusive use of independent contractors and their employees, who performed work at the struck premises. In addition to the picketing, the union orally requested contractors' employees, as they approached the gate, not to enter.

The sole question in the case was the validity of the picketing at this reserved gate, and the accompanying oral appeals. The Board held that the union's conduct was unlawful because its "object" was "to enmesh these employees of the neutral employers in its dispute with the Company." 123 N.L.R.B. 1547, 1550-51. The Court of Appeals affirmed the Board's decision. 278 F. 2d 282 (D.C. Cir. 1960).

Despite the somewhat allegorical language of the Board's opinion in *General Electric*, it is quite apparent that what made the union's conduct in that case unlawful in the Board's view was the fact that the picketing and the oral appeals were addressed *solely* to the employees of other employers, and therefore could not be justified as "incidental" to an appeal to employees of General Electric to stay away from the struck premises. This was the theory urged before the Board by its General Counsel, 123 N.L.R.B. at 1561-62,³ and urged in this Court, in support of the Board's decision, by General Electric. See Br. for Resp. Gen. Elec. Co. at pp. 1415.

Thus, the theory of the decision of the Board in *General Electric* was precisely the theory on which the Court below relied in this case: picketing, to be lawful, must "be conducted in such a manner and at such a place as to minimize its impact on neutral employees insofar as this [can] be done without substantial impairment of the effectiveness of

³ In this Court, the Board presented an argument which one commentator has described as "at the least, a significant reformulation of the Board's approach to Section 8(b)(4); at most, it was an outright abandonment." Leinick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363, 1385 (1962). Since the Board's argument was not accepted by this Court, it is unnecessary to discuss it here.

the picketing in reaching the primary employees" (R. 403). Had this Court accepted that principle, it would have had to affirm the decision of the Board in *General Electric*.

But this Court did *not* accept that principle, and it did *not* affirm the Board's decision in *General Electric*. The question, the Court said, was one of distinguishing between "legitimate 'primary activity' and banned 'secondary activity.'" The question was not to whom the picketing was addressed. "Picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer," 366 U. S. at 673-74.

What, then, is the line? After reviewing the decisions the Court concluded that "the key to the problem is found in the type of work that is being performed by those who use the separate gate." Where the secondary employees "were performing tasks unconnected to the normal operations of the struck employer—usually construction work on new buildings"—appeals to them were appeals for secondary pressure. "On the other hand," the Court said, "if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion of traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations" 366 U. S. at 680-81 (emphasis supplied).

Thus, the Court in *General Electric* held that picketing for the sole purpose of inducing the employees of "neutral" employers not to work is *lawful* if their work aids the everyday operations of the struck employer. Asking secondary employees to refrain from making deliveries, or performing other work related to the struck employer's operations, is "traditional primary activity." On the basis of this reasoning, the Court vacated the decision of the Board and the Court of Appeals, and remanded the case for a deter-

mination of the type of work performed by the employees using the reserved gate. On remand the Board found that the work was such as to make the picketing lawful, and thus reversed its previous decision. 138 N.L.R.B. No. 38, 51 L.R.R.M. 1028 (1962).

The conclusion which this Court reached in *General Electric* is plainly contrary to the central thesis of the court below—that only appeals to primary employees are lawful in themselves, and that the involvement of neutral employees is permissible only if “incidental to the independently legitimate objective of publicizing the dispute with the primary employer to the employees of *that* employer” (R. 406, emphasis added). This conflict was not acknowledged, however. Instead, the court below developed its entire thesis on the basis of cases decided before *General Electric* and, at the very end, brushed that decision aside on the basis of a fact totally unrelated to the rationale of the decision—the fact that the picketing there took place at the primary employer’s premises. It did this despite its later statement, on rehearing, that a distinction based on location was “a distinction that appears to be without a difference” (R. 439).

We will deal with this distinction in Part C, beginning at p. 34, below. Before doing so, however, we believe it is necessary to describe in some detail the relationship between the *General Electric* decision and the development of the law which preceded it. It was apparently the failure of the court below to understand this relationship which led it to rely on cases which, as we shall see, *General Electric* necessarily overruled, and to attempt to distinguish *General Electric* on a ground which is extraneous both to that decision and to the statute itself.

B. To the Extent That the Decisions Upon Which the Court Below Relied Support Its Conclusion, They Are in Conflict with *General Electric*.

As we have indicated above, prior to this Court’s decision in the *General Electric* case the decisions of the Board and

the lower federal courts were in a state of considerable conflict and confusion on the question of whether, and to what extent, a union may lawfully request the assistance of secondary employees in connection with a lawful primary strike.

It was presumably for the purpose of resolving that conflict that this Court originally granted certiorari in *General Electric*. However, this Court's opinion in that case does not expressly acknowledge the existence of this conflict, nor does it name the decisions and articulate the doctrines which its decision necessarily overrules. Therefore, in order to determine which of the many cases decided prior to *General Electric* are still good law, it is necessary not only to examine the opinion in *General Electric*, but also the background of conflicting decisions against which that case arose.³ That background can conveniently be divided, as the court below divided it, into two periods: 1947 to 1952, and 1953 to 1961.

1. *The Period of Consistency: 1947-1952*

In the years immediately following the enactment of Section 8(b)(4)(A) (which is now 8(b)(4)(B))⁴ the Board developed a rather simple and straight-forward interpretation of that Section, based on the premise that the statute was designed to prohibit "secondary boycotts," but was not intended to affect the lawfulness of the ordinary primary strike. Thus, the Board held that it is an unlawful secondary boycott for a union to engage in a strike or picketing against a "secondary" employer, at that employer's premises, in order to bring pressure on the "primary" employer, with whom the union has a legitimate dispute. *E.g., United Brotherhood of Carpenters (Wadsworth Building Co.)*, 81 N.L.R.B. 802.

³ For a more extensive review of the relevant cases than is possible within the limits of this brief, see the section entitled "The Shifting Currents of Board Doctrine, 1949-1962" in Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363, 1366-1392 (1962).

⁴ See note 1, *supra*.

(1949); *Printing Specialties Union (Sealbright Pacific)*, 82 N.L.R.B. 271 (1949). This appears to be the type of conduct with which Congress had been most concerned:

"Under clause (A) strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly, it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 43 (1947). See also S. Rep. No. 105, 80th Cong., 1st Sess. 22 (1947).

On the other hand, the Board, in a number of cases, held that it was not an unfair labor practice for a union, in connection with a strike against a primary employer, to "induce or encourage" employees of other employers not to enter or perform work at the primary employer's premises. E.g., *Oil Workers Int'l Union (Pure Oil Co.)*, 84 N.L.R.B. 315 (1949); *United Elec. Workers (Ryan Constr. Co.)*, 85 N.L.R.B. 417 (1949); *Newspaper Deliverers' Union (Interborough News Co.)*, 90 N.L.R.B. 2135 (1950). The Board reasoned that the traditional primary strike had always included efforts by the striking union, through picketing and other means, to persuade all persons, including customers and secondary employees as well as primary employees, not to enter or perform work at the struck site, and the legislative history of the Act did not indicate any Congressional intention to reach this common type of activity. It therefore concluded that Section 8(b)(4)(A) should not be construed to prohibit such conduct.

On the basis of this reasoning the Board held that all picketing around the primary employer's premises was lawful, even where it took place at a gate used exclusively by secondary employees. *Ryan Constr. Co., supra*. On the same reasoning, the Board also held that other types of inducement of secondary employees to stay away from the struck premises were not prohibited by the statute. In *Pure Oil*, for example, the union wrote a letter to the employees of a ship, owned by a secondary employer, asking them not to load products at the struck employer's dock. And in *Interborough News*, the striking union visited secondary employees in their homes to ask them not to make deliveries to the struck employer's newsstands. This type of conduct, the Board held, was no more unlawful than picketing the primary employer's premises, since it also did not ask secondary employees to engage in a strike against their employer, but only to refrain from working at the struck site.

The same result was reached where the nature of the primary employer's business was not stationary. In *International Brotherhood of Teamsters (Schultz Refrigerated Service, Inc.)*, 87 N.L.R.B. 502 (1949), the union was on strike against a trucking company. The union pickets followed each truck, and picketed around it whenever it stopped to make pickups and deliveries at the premises of other employers. Since the picketing was confined to the trucks—which in this case were analogous to the "premises" of a stationary employer—the Board held the picketing lawful, even though it induced employees of other employers not to load or unload the trucks. The Board stressed the fact that the picketing at the premises of secondary employers took place only when the trucks were there, and only in their immediate vicinity.

During this same period the Board developed its now famous *Moore Dry Dock* doctrine, which requires special mention because it appears to have been the source of much of the confusion which subsequently arose. In *Sailors'*

Union of the Pacific (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950), the Board was confronted with the problem of applying the principle of the above cases to a factual situation in which the union could not picket the primary employer without simultaneously picketing the secondary. The primary employer in that case was the owner of a ship, the S.S. Phopho, which at the time the case arose was being serviced at a dock owned by Moore, a secondary employer. The union pickets were not permitted on the dock, where they could have picketed the ship, so they picketed in front of the Moore premises. The problem posed by this conduct was not that it might induce employees of Moore to refrain from servicing the Phopho—this the union could clearly do under the doctrine of the cases cited above—but that it might induce them to refrain from performing any work at the Moore premises. To avoid this result, the Board held that picketing in such circumstances would be permissible only if it complied with the following safeguards: (1) the picketing must take place only when the situs of the dispute (the ship) is located at the secondary premises, (2) it must take place only when the primary employer is engaged in his normal business at those premises, (3) it must take place reasonably close to the situs of the primary dispute, and (4) the pickets must disclose clearly that the dispute is with the primary employer. These rules were subsequently applied the primary employer's business was located at the premises by the Board in all "common situs" cases—cases in which the primary employer's business was located at the premises of a secondary employer, or premises shared by the primary employer with other employers.

The original purpose of these safeguards was to assure that the effect of the picketing on secondary employees would not be broader than the usual effect of primary picketing. Their purpose was not to prevent the picketing from affecting secondary employees at all. The Board in *Moore Dry Dock* made it absolutely clear that it was not modifying the principle developed in the other cases cited above, but

merely adapting that principle to the peculiar circumstances of a "common-situs" situation.

During this period, this Court dealt directly with the question of the extent to which a striking union may enlist the aid of secondary employees in *International Rice Milling Co. v. NLRB*, 341 U. S. 665 (1951). In that case, union pickets in front of a struck plant induced secondary employees who were operating a truck not to cross the picket line. The Board had found no violation, relying upon its decision in *Pure Oil*, 84 N.L.R.B. 360 (1949). The Fifth Circuit had reversed the Board, holding essentially what the court below held in the present case: that any attempt to induce employees of a secondary employer to refrain from working is a violation of Section 8(b)(4). 183 F.2d 21 (1950).

This Court reversed the court of appeals, and upheld the original decision of the Board. In doing so, however, the Court articulated its decision somewhat differently than the Board had. Instead of distinguishing between "primary" and "secondary" activities, the Court stated:

"A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8(b)(4), and they do not here." 341 U. S. at 671

It was never entirely clear whether this reasoning was intended to imply any limitation on the holding of the Board that Section 8(b)(4) does not prohibit any attempt to induce employees of secondary employers not to work at the struck employer's premises. While the above-quoted excerpt could be read more narrowly than the prior Board decisions, other portions of the opinion seemed to support the Board

fully. Thus, the Court stressed the fact that "Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike." *Id.* at 672. Perhaps even more significantly, the Court cited with apparent approval the Board's decision in *Pure Oil and Ryan*, each of which involved wholesale and undisguised inducements of secondary employees not to work at the primary employer's premises. *Id.* at 672-73 n. 6.

Thus, at least until 1953, this Court's decision in *International Rice Milling* was generally construed as vindicating the position of the Board. Compare the majority opinion in *Di Giorgio Fruit Corp. v. NLRB*, 191 F. 2d 642, 649 (D. C. Cir.), *cert. denied*, 342 U. S. 869 (1951) with the separate opinion of Judge Miller in that case, 191 F. 2d 654.

In 1953, however, a new administration in Washington brought new members to the NLRB, who began to read this Court's decision in *International Rice Milling* more and more narrowly, and Section 8(b)(4)(A) more and more broadly.

2. The Period of Conflict and Confusion: 1953-1961

The first hint that the law was about to become unsettled came in *Brewery Drivers Local 67 (Washington Coca Cola Bottling Co.)*, 107 N.L.R.B. 299 (1953), *enforced*, 220 F. 2d 530 (D.C. Cir. 1955). In that case, the union was on strike against a soft-drink bottling plant. In support of the strike it picketed the plant, and also assigned pickets to follow the struck employer's trucks as they delivered the plant's products to retail stores. The union also picketed the stores at times when the trucks were not present, with signs which purported to be addressed only to consumers, but in a manner calculated to appeal as well to secondary employees working at the stores or making deliveries to them. There was thus sufficient evidence for the Board to find that at least some of the picketing activities at these stores violated Section 8(b)(4)(A) on any theory. The Board, however, held that all picketing away from the main bottling

plant was unlawful. It distinguished *Moore Dry Dock* and *Schultz* on the ground that in those cases there was no place other than the secondary employer's premises where the union could picket. The reason why this distinction was significant was not explained.

From this decision there developed what became known as the *Washington Coca Cola* doctrine. That doctrine was that picketing at a secondary employer's premises, even if it met the four *Moore Dry Dock* safeguards, was unlawful if the employer had his own premises at which the union could picket.⁵ A rationale for this doctrine was ultimately developed, and was stated most fully in *Local 657, International Brotherhood of Teamsters (Southwestern Motor Transport, Inc.)*, 115 N.L.R.B. 981, 983-84 (1956): Picketing at the primary employer's premises is permitted by the Act, the Board said, because it brings pressure on the primary employer "through appeals to his own employees, and any affect which such picketing may have on the employees of some other employer is regarded as only incidental." Picketing at a secondary employer's premises, on the other hand, is prohibited by the Act because it appeals to secondary employees. An exception occurs, however, when there are no primary premises to picket. In that limited situation picketing at the secondary premises at which the primary employer's business is located is permitted on the basis of a "reasonable, although rebuttable, presumption that a labor organization in such circumstances is seeking to appeal only to the primary employer's employees."

Although the Board, in announcing this new formulation of the difference between primary conduct and secondary conduct, dutifully cited *Pure Oil*, *Ryan*, and *Moore Dry*

⁵ See, e.g., *Sales Drivers Union (Campbell Coal Co.)*, 110 N.L.R.B. 2192 (1954) reversed, 229 F. 2d 514 (D.C. Cir. 1955), cert. denied, 351 U.S. 972; *Seattle Dist. Council of Carpenters*, 114 N.L.R.B. 27 (1955); *International Bh'd of Teamsters Local 659*, 116 N.L.R.B. 461 (1956); *Truck Drivers Union*, 111 N.L.R.B. 483 (1955); enforced, 228 F. 2d 791 (5th Cir. 1956).

Dock, among others, it simultaneously scuttled the very principle for which they stood. Henceforth, the validity of picketing would not turn on whether the union was appealing to secondary employees to stop working elsewhere than at the primary employer's premises, but whether it was appealing to them at all. Henceforth, only those effects on secondary employees which could be regarded as "incidental" would be tolerated. In a subsequent case (in which the Board reached what appears to have been a correct result on the facts)²⁴ the new rule was expressed even more bluntly:

"In developing and applying these [common situs] standards, the controlling consideration has been to require that the picketing be so conducted as to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees." *Retail Fruit & Vegetable Clerks Local 1017 (Crystal Palace Market)*, 116 N.L.R.B. 856, 859 (1956), enforced, 249 F. 2d 591 (9th Cir. 1957) (Emphasis by the Board).

It was not long before the Board had a case in which the application of this principle effectively barred all picketing. In *Seafarers' Int'l Union (Salt Dome Production Co.)*, 119 N.L.R.B. 1638 (1958), reversed, 265 F. 2d 585 (D.C. Cir. 1959), the union was on strike against a ship being serviced at a secondary employer's shipyard (essentially the facts of *Moore Dry Dock*). There were, however, no primary employees on the ship. The picketing, therefore, could not possibly be justified as an appeal to primary employees with

²⁴ The strike in that case was against one of several independent fruit stands located in one large fruit market. The owner of the struck stand happened also to be the owner of the market building. The union picketed the entire building, although it was given permission to enter the building for the purpose of picketing only the struck stand. In those circumstances, the union's conduct plainly exceeded the *Moore Dry Dock* limitations.

only "incidental" effects on secondary employees. The Board, therefore, held it to be violative of Section 8(b)(4)(A).

This new notion that the Act requires picketing to be conducted in such a way as to "minimize its impact on neutral employees" was first developed and applied in "common situs" cases such as *Washington Coca Cola*. Its logic, however, was equally applicable to picketing at single-employer premises, and it was not long before the Board began applying it in such situations also. Thus, in *Local 618, Automotive Employees (Incorporated Oil Co.)*, 116 N.L.R.B. 1844 (1956), reversed, 249 F. 2d 332 (8th Cir. 1957), a union, in support of a primary strike against a chain of gasoline service stations, picketed one of the service stations which the employer had temporarily shut down for repairs. Since the only employees working at that station were those employed by independent contractors making the repairs, the Board held that the picketing was intended to appeal only to those employees, and hence violated Section 8(b)(4). The fact that those employees were working at the premises of the primary employer was held to be irrelevant.

The decision of the Board in the *General Electric* case and the other separate gate cases⁸ logically followed. Once having developed the theory that the only legitimate object of primary picketing is to appeal to primary employees, the conclusion that picketing at a gate which was used solely by secondary employees is unlawful followed automatically. The union's object was to "enmesh" the employees of the secondary employers in the primary dispute, hence it violated Section 8(b)(4).

⁸ *United Steelworkers (Phelps-Dodge Refining Corp.)*, 126 N.L.R.B. 1367 (1960), enforced, 289 F. 2d 591 (2d Cir. 1961); *Local 36, International Chemical Workers Union (Virginia-Carolina Chemical Corp.)*, 126 N.L.R.B. 905 (1960), enforced, 47 L.R.R.M. 2493 (D.C. Cir.), cert. denied, 366 U. S. 949 (1961). See also *Union de Trabajadores (Gonzales Chemical Industries, Inc.)*, 128 N.L.R.B. 1352 (1960), reversed, 293 F. 2d 881 (D.C. Cir. 1961).

This Court, in *General Electric* stated that the "Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings." 366 U. S. at 680. In fact, however, the Board's rationale in *General Electric* was not first stated in that case, but can be traced back to *Washington Coca Cola*. Moreover, that rationale had nothing to do with the nature of the work done by the secondary employees. It was based solely on the fact that they, were not primary employees. Indeed, in at least two cases which this Court seems to have overlooked, the rationale was applied by the Board in situations where the secondary employees were performing ordinary delivery work plainly related to the normal operations of the struck employer. *Chauffeurs Local 175 (McJunkin Corp.)*, 128 N.L.R.B. 522 (1960), *reversed*, 294 F. 2d 261 (D.C. Cir. 1961) (picketing at separate gate to primary premises used solely for deliveries and pickups); *Lumber Workers Local 2409 (Great Northern Ry.)*, 122 N.L.R.B. 1403 (1959), 126 N.L.R.B. 57 (1960). (picketing at separate entrance used solely by railroad making pickups and deliveries).

At no time, however, did this new principle become firmly established as law. The Board itself did not ever expressly overrule *Pure Oil*, *Interborough News*, or any of the other cases, with the exception of *Ryan*,⁷ in which the original distinction between primary and secondary picketing had been developed. Moreover, the Board decisions in which the new concepts were applied did not fare well in the courts of appeals. The *Washington Coca Cola* doctrine was re-

⁷ *Ryan* was overruled by a minority of the Board in *Retail Fruit Clerks (Crystal Palace Market)*, 116 N.L.R.B. 856, 859 (1956), *enforced*, 249 F. 2d 591 (9th Cir. 1957), and by a majority of the Board in *Virginia-Carolina Chemical Corp.*, note 6 *supra*.

peatedly criticized.⁹ The Eighth Circuit denied enforcement of the Board's order in *Incorporated Oil*,¹⁰ and the decisions in *Salt Dome*¹⁰ and *McJunkin*¹¹ were rejected by the D.C. Circuit.

To add to the confusion, the Board from time to time throughout this period sustained as "primary" activity union conduct which was plainly calculated to appeal principally to secondary employees. In *Chauffeurs Local 200 (Milwaukee Plywood Co.)*, 126 N.L.R.B. 650 (1960), *affirmed*, 285 F. 2d 325 (7th Cir. 1960) the union, in support of a strike at a Chicago plant, picketed the employer's wholly owned subsidiary in Milwaukee. After a short time, the employees of the subsidiary ignored the picket line and continued working, but the pickets did succeed in preventing secondary employees from entering the premises. The inference that this was the principal, if not the sole, purpose of the picketing was bolstered by the fact that the union instructed these secondary employees by telephone not to cross the picket line. Nevertheless, the Board found this to be lawful primary activity. Similar conduct was upheld in *International Brotherhood of Teamsters (Alexander Whse. Co.)*, 128 N.L.R.B. 916 (1960), where the picketing in question took place at the primary employer's non-union warehouses. Obviously, the union did not seriously expect the non-union primary employees to stop working—the sole purpose and effect of the picketing was to persuade unionized secondary employees not to enter the primary employer's warehouses. And in *International Organization of Masters, Mates & Pilots (Chicago Calumet Stevedoring*

⁹ See *NLRB v. Local 294, Int'l Bhd of Teamsters*, 284 F. 2d 887, 891 (2d Cir. 1960); *Sales Drivers v. NLRB*, 229 F. 2d 514 (D.C. Cir. 1955); *cert. denied*, 351 U.S. 972 (1955); *NLRB v. General Drivers*, 223 F. 2d 205 (5th Cir. 1955), *cert. denied*, 350 U.S. 914 (1955).

¹⁰ *Local 618, Automotive Employees v. NLRB*, 249 F. 2d 332 (8th Cir. 1957).

¹¹ *Seafarers Int'l Union v. NLRB*, 265 F. 2d 585 (D.C. Cir. 1959).

¹² *Chauffeurs Local 175 v. NLRB*, 294 F. 2d 261 (D.C. Cir. 1961).

Co.), 125 N.L.R.B. 113 (1959), the union, in connection with a strike against certain shipping companies, not only picketed the struck ships but also appealed directly to secondary employees, by means of telegrams to and conferences with officials of their unions, and speeches at their union meetings, not to load, unload, or otherwise perform work on the struck ships. The Board found no violation of Section 8(b)(4)(A) except in those instances where the union's picketing violated the *Moore Dry Dock* criteria.

It was against this background of confusing and conflicting decisions that *General Electric* was presented to this Court.

3. *This Court's Resolution of the Problem*

The facts of *General Electric* compelled this Court to resolve the conflict which had developed as to where the line between lawful primary conduct and prohibited secondary conduct was to be drawn. If all appeals to secondary employees were to be considered unlawful except insofar as they were "incidental" to a permissible appeal to primary employees, then clearly the union's conduct in that case was unlawful, since it took place at a separate gate where there could only be secondary employees. On the other hand, if all appeals to secondary employees to refrain from performing work at the primary employer's premises were lawful, then clearly the union's conduct in that case was protected primary activity, since it sought solely to keep secondary employees away from the struck plant.

The Court, however, was plainly dissatisfied with either of these contentions. It recognized that to bar appeals to certain secondary employees, such as those who make deliveries to the struck employer, would be an altogether undue restriction on the right to strike. It recognized also, however, that where the primary employer simply shares a common location with other employers whose operations are unrelated to his own, union pressure against those other em-

employers must be regarded as secondary, even though the shared premises might be owned by the primary employer. 366 U. S. at 678-79.

Thus, the Court concluded that "the key to the problem" was the "type of work that is being performed" by the employees appealed to—not, as the Board had held, the identity of the employees to whom the union was appealing nor, as the union contended, the location of the work which the union was asking those employees to stop performing. If the secondary employees are performing work related to the normal operations of the primary employer, then it is a lawful part of a primary strike to induce those employees to refrain from doing that work until the dispute is settled. Conversely, if their work is unrelated to the primary employer's operations, then any direct interference with that work must be regarded as "secondary" pressure.

The theory of the decision seems to be that the primary strike is essentially an effort to bring pressure on the primary employer by interrupting his normal operations. The secondary boycott, on the other hand, is an effort to bring pressure on secondary employers to force them to stop doing business with the primary. Thus, when a union asks employees—whether they be primary or secondary—to refrain from doing work related to the primary employer's operations, it is engaging in primary conduct. The "object" of such conduct is not to bring pressure on the secondary employer, but to interrupt the operations of the primary. On the other hand, when the union asks secondary employees to refrain from performing work which is unrelated to the primary employer's operations, it is engaging in secondary conduct, since its "object" is not to bring direct pressure on the primary, but to bring indirect pressure on him through the application of pressure on the secondary employer.

It is thus clear that the decision of this Court in *General Electric* reversed not only the rationale of the Board's decision in that case, but a number of other cases as well.

Surely, the *Washington Coca Cola* doctrine could not survive.¹² Since the delivery of Coca Cola was as much a part of the employer's operations in that case as the bottling of Coca Cola, the striking union could lawfully picket not only the bottling plant, but the employer's delivery trucks, for the purpose of inducing secondary employees not to unload the trucks, service them, or perform other work related to that part of the primary employer's operations. Nor could the Board's decision in *Salt Dome* survive, since the union in that case was merely asking employees of the secondary employer not to perform maintenance and repair work on the struck ship. Similarly, the decisions of the Board in *McJunkin* and *Great Northern Ry.* were necessarily overruled by this Court's decision in *General Electric*, since in both cases the union was simply asking secondary employees not to make deliveries or pickups at the struck employer's premises.

Thus, the cases relied upon by the Court below simply are no longer the law, at least to the extent that they hold or imply that the statute prohibits appeals to secondary employees who perform work related to the normal operations of the plant.

The only remaining question raised by the opinion of the court below is whether the present case can be distinguished from *Local 761* on the basis of the location of the union's picketing. We turn now to an examination of that question.

C. The Location at Which Picketing Is Conducted Is Relevant Only Insofar as It Tends to Reveal Its Purpose. Since the Purpose of the Picketing in This Case Is Undisputed, Its Location Is Irrelevant.

As we have seen, the principal thesis of the court below was that picketing is unlawful if it is addressed solely to the

¹² It is significant that the Board itself has recently overruled *Washington Coca Cola*. *Local 861, IBEW (Plauche Elec. Inc.)*, 135 N.L.R.B. 250 (1962).

employees of secondary employers. As we have demonstrated, that thesis, although it finds support in some Board decisions prior to the *General Electric* decision of this Court, is in square conflict with that decision, which plainly held that a union may lawfully induce secondary employees, by picketing, or otherwise, to refrain from performing work related to the primary employer's operations.

The court below, however, distinguished *General Electric* in the following fashion:

"The Court's holding in *General Electric* does not, of course, conflict with the result we here reach. In both cases union picketing activities are held to violate § 8(b)(4) of the Act because of their appeal to neutral employees. In *General Electric*, the picketing took place at the premises of the employer with whom the union was engaged in a dispute. The Supreme Court limited its finding of illegality, therefore, to circumstances in which the neutral employees were not engaged in work connected with the normal operations of the plant. In so limiting its holding the Court acknowledged the special solicitude of Congress and the Board that the statute not unduly restrict traditional picketing at the premises of the primary employer. *Local 761 (General Electric)*, *supra* at 679, 681.

In this case, however, the union activity occurred on the right of way of the New York Central Railroad. No special policy of greater latitude for picketing at the primary employer's premises thus comes into play, and no distinction based on the work performed by the neutral employees need be made." (R. 407; emphasis in original).

It is impossible to reconcile this reasoning with the balance of the court's opinion. The court's basic rationale, that the statute requires picketing to be conducted so as to minimize its impact on neutral employees to the extent it is possible

to do so without precluding appeals to primary employees, is equally applicable whether the picketing is conducted at the primary premises or elsewhere.

We are thus constrained to treat the last few paragraphs of the court's opinion as an alternative holding, to this effect: assuming that it is lawful for a striking union to engage in picketing at the primary employer's premises for the purpose of inducing secondary employees to refrain from performing work related to the primary employer's operations, it is nevertheless unlawful to engage in picketing or other conduct for the same purpose at any other location. Since in this case the railroad tracks, and the gate through which they entered the struck plant, were not owned by the primary employer, the picketing in this case was not conducted "at the primary employer's premises" and was therefore unlawful.

The location at which a union engages in picketing is, in most circumstances, a good indication of what such picketing is expected to accomplish. For that reason, the Board and the courts have generally paid considerable attention to the question of where the picketing activities have been conducted. But despite all the changes and fluctuations which have taken place in the law, there has never, to our knowledge, been a case in which the location of the union's picketing has itself been regarded as the controlling consideration.

The statute with which we are here concerned does not, after all, regulate picketing as such. It prohibits a union from inducing or encouraging employees to engage in work stoppages for certain prohibited objectives. Picketing is one of several ways in which unions "induce or encourage" work stoppages. Nor does the statute make any distinction based on where the inducement or encouragement takes place. The question in every case is not where it takes place, but what is its purpose or "object." The location of the picketing or other inducement is important only as it sheds light on the purpose or object sought to be achieved.

As we have seen, in the cases decided between 1947 and 1952 the Board did rely in certain cases on location. The location which was important, however, was the location of the work which the secondary employees were to perform, not the location of the pickets. If that work was located on the premises of the primary employer, the Board held in the 1947-1952 period that inducement of the secondary employees not to perform it was lawful; if the work was located elsewhere, inducement of primary employees not to perform it was lawful but inducement of secondary employees was not. In no case, however, was the form of the inducement or its location regarded as controlling in itself.

Thus, in *Pure Oil*,¹³ the inducement took the form not only of picketing at the primary site, but also a letter to the secondary employees. In *Interborough*¹⁴ the inducement included visits to the secondary employees away from the primary premises. In *DiGiorgio*¹⁵ it took the form of union disciplinary action against secondary employees who disobeyed the union's instructions. All of these inducements occurred away from the primary site. Nevertheless, the Board found no violation since the secondary employees were being induced only to stop working at the primary premises.

Of course, when the inducement took the form of picketing, as it almost always did, the location of the picketing was highly relevant because unions usually picket the place where they are attempting to cause work to be stopped. But the controlling consideration was not the location of the picketing, but the location of the work which the employees were being asked not to perform.

In the cases decided between 1953 and 1961, the Board, in some cases at least, stopped asking "where" and began asking "who," adopting the view that all appeals to secondary employees were unlawful unless they were merely the by-product of lawful appeals to primary employees. Here again, when the inducement took the form of picketing, the location

¹³ 84 N.L.R.B. 315 (1949).

¹⁴ 90 N.L.R.B. 2135 (1950).

¹⁵ 191 F. 2d 642 (D.C. Cir.), cert. denied, 342 U. S. 869 (1951).

of the picketing was relevant in determining whether the union was appealing to primary or to secondary employees, but was not itself the controlling consideration. Thus in *Washington Coca Cola*, picketing of the primary employer's trucks at the premises of secondary employees was regarded as a way of appealing principally to secondary employees, and therefore unlawful, since the union could adequately reach primary employees by picketing the employer's plant without affecting secondary employees. In *General Electric* and the other separate gate cases, the fact that the picketing took place at a gate used solely by secondary employees was regarded by the Board as proof that the purpose of the picketing was solely to appeal to such employees. But the basic test in each case was the purpose of the picketing, not the location.

This Court in *General Electric*, as we have seen, rejected both the "where" and the "who" approaches and said that "the key to the problem" is "the type of work" which the employees were being asked not to perform. (366 U. S. at 680). As we read that decision, this test does not depend on where the work is to be performed at all. If work related to the primary employer's normal operations is being performed at a secondary employer's premises, as for example, in *Moore Dry Dock*, then, under this Court's decision, the union can ask the workers not to perform it, so long as it does so in a manner which does not interfere with work unrelated to the primary employer's operations. Conversely, if secondary employees are performing work at the primary employer's premises which is unrelated to that employer's operations, and a separate gate has been reserved for the exclusive use of such employees, then the union cannot picket at that gate even though the work is located on the primary premises.

Even if we should be wrong in our reading of the *General Electric* decision, and that decision is somehow regarded as setting forth a rule applicable only to the primary employer's premises, the applicability of the rule must depend on where the work is to be performed, not where the solicitation takes

place. The only relevance that the location of the picketing can possibly have is as evidence of the "object" of the solicitation.

In the present case, there has never been any dispute as to the "object" of the union's picketing activities. It was to prevent the employees of the New York Central Railroad from moving its train on track located on Carrier property in order to make pickups and deliveries at the Carrier plant. Since that track was connected to the railroad's main spur inside the plant enclosure, the union could picket only on the public road adjacent to the gate through which that main spur ran. But it did not interfere with the railroad's use of the gate or the spur to serve its other customers. Only when the railroad was attempting to switch onto tracks which ran on Carrier property, for the purpose of picking up Carrier products, did the union take action.

Since the purpose of the union's picketing activity is thus clear and undisputed, the location at which that activity occurred has absolutely no bearing on this case. And since that purpose was solely to prevent the railroad employees from performing work related to the operations of Carrier, the union's conduct did not violate Section 8(b)(4)(B).

II—THE PRESENCE OF COERCION, IN ADDITION TO PEACEFUL PERSUASION, DOES NOT CONVERT CONDUCT WHICH IS OTHERWISE LAWFUL UNDER SECTION 8(b)(4)(B) INTO A SECONDARY BOYCOTT

The argument above disposes of the two grounds upon which the court below relied for its decision that the union's picketing in this case was unlawful—that the picketing was addressed solely to secondary employees, and that it took place around tracks and a gate owned by the secondary employer. There is, however, another argument which the company has advanced for finding that the union's picketing violated Section 8(b)(4)(B). That argument is that

even if the peaceful aspects of the picketing did not violate Section 8(b)(4)(i)(B), the physically coercive aspects violated Section 8(b)(4)(ii)(B). The dissenting opinion of Board Member Rogers relies in part on this argument. (R. 370-71).

We find nothing in the opinion of the court below which indicates that the court accepted that argument, although the company apparently believes that it did. See *Br. in Opp. for Carrier Corp.*, p. 2, n. 1. Since it appears that the company intends to press this argument in this Court, we deal with it here.

The question raised by this argument is not, of course, whether conduct which is physically coercive is or is not lawful. Violence in all its aspects is prohibited by state law, and indeed a state court in this very case issued an injunction against violent conduct connected with the strike. Moreover, Section 8(b)(1)(A) of the Act prohibits coercion or restraint of employees in the exercise of their rights under the Act. The conduct of the union in this case was found to be in violation of that Section, and we have not challenged that finding.

Section 8(b)(4)(ii), however, does not prohibit coercion and restraint as such, any more than 8(b)(4)(i) prohibits strikes and picketing as such. The statute prohibits either form of activity only when it is engaged in for one of the prohibited objects specified by the statute.

This is clear not only from the language of the statute, but from its legislative history. Section 8(b)(4) as originally written prohibited only the most common form of union pressure against secondary employers—strikes and picketing—where the object of such pressure was to force a secondary employer to stop doing business with the primary employer. Those who advocated amendment of the statute in 1959 contended that the statute contained a “loophole” to the extent that it did not reach other forms of pressure which had the same object. Thus, while unions could not strike or

picket the secondary employer, they could threaten to do so with impunity. They could also induce persons employed by secondary employers who are not "employees" as defined in the Act to engage in secondary work stoppages. They could also, at least so far as federal law was concerned, physically coerce or restrain the secondary employer, or his supervisors, to force them to stop doing business with the primary.

It was to eliminate these "loopholes" that Section 8(b)(4) was amended. The new language found in 8(b)(4)(ii) was thus designed to prohibit any form of coercion of secondary employers to force them to stop doing business with a primary employer. ~~is to be prohibited.~~ See 2 Legislative History, Labor-Management Reporting and Disclosure Act of 1959 pp. 977, 979, 989, 993-94, 1079.

Congress did not, however, amend Section 8(b)(4) so as to prohibit coercion and restraint regardless of its object. The structure of the statute remained the same—certain conduct is prohibited only when engaged in for certain prohibited objects. The definition of these prohibited objects was not changed in any manner material to this case.

Thus, the question in the present case is not whether the union's conduct was of the sort covered by Section 8(b)(4), but whether its "object" was one which falls within the prohibition of that Section. Even peaceful picketing is prohibited if its object is unlawful. Therefore, if the union's object in this case were one prohibited by Section 8(b)(4), its action would violate that section even if it had been unaccompanied by violence. Conversely, even physical coercion is not prohibited by Section 8(b)(4) if its "object" is not one of those specified in that Section.

As we have seen, the union's object in this case was to interrupt the primary employer's operations, not to bring pressure on the secondary employer, New York Central. That "object," under this Court's decision in *General Electric*, is

not one of those prohibited by Section 8(b)(4). Accordingly, the union's conduct, whether peaceful or violent, cannot constitute a violation of that Section.

CONCLUSION

For the reasons stated, the decision of the court below should be reversed.

Respectfully submitted,

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